BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does a change in state parole guidelines, under which the agency retains discretion in its decision-making, and which does not increase the quantum of the prisoner's punishment, violate the ex post facto clause of the United States Constitution?

2. Does a dangerous criminal offender, who is serving a criminal sentence, and is also civilly committed as a psychopathic personality, possess a constitutional right under the due process clause of the fourteenth amendment to the United States Constitution to treatment for his psychopathic personality condition?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 6

I. THE PETITION SHOULD BE DENIED AS TO PETITIONER'S EX POST FACTO CLAIM BECAUSE THE OVERWHELMING WEIGHT OF AUTHORITY SUPPORTS THE MAJORITY DECISION BELOW THAT THE CHALLENGED CHANGE IN MINNESOTA'S PAROLE RULES DOES NOT VIOLATE THE EX POST FACTO CLAUSE 6

A. The Minnesota Rules Are Not Laws For Purposes Of The Ex Post Facto Clause 6

B. Even If The Minnesota Rules Are Laws, They Do Not Substantially Disadvantage Petitioner And Therefore Do Not Violate The Ex Post Facto Clause 10

II. THE COURT SHOULD DENY THE PETITION AS TO PETITIONER'S CLAIM OF A RIGHT TO TREATMENT UNDER THE FOURTEENTH AMENDMENT BECAUSE THERE IS NO SPLIT IN THE CIRCUITS AND BECAUSE OTHER GROUNDS SUPPORT THE DECISIONS OF THE COURTS BELOW 14

A. The Eighth Circuit Reasonably Determined That Petitioner Has No Fourteenth Amendment Right To Treatment, And There Is No Split In The Circuits On This Issue 15

B. DHS Defendants Are Qualifiedly Immune From Damages 16

TABLE OF CONTENTS – Continued

Page

C. DHS Defendants Are Entitled To Judgment As A Matter Of Law 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

FEDERAL DECISIONS:

Akins v. Snow, 922 F.2d 1558 (11th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 291 (1991) 12, 13

Anderson v. Creighton, 438 U.S. 635 (1987)..... 17

Bailey v. Noot, 940 F.2d 1150 (8th Cir. 1991) .... *passim*

Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977) 16

Burnside v. White, 760 F.2d 217 (8th Cir.), cert. denied, 474 U.S. 1022 (1985)..... 12

DiNapoli v. Northeast Regional Parole Comm'n, 764 F.2d 143 (2d Cir.), cert. denied, 474 U.S. 1020 (1985).....7, 8

Dufresne v. Baer, 744 F.2d 1543 (11th Cir. 1984), cert. denied, 474 U.S. 817 (1985)..... 7

Eckerhart v. Hensely, 475 F. Supp. 908 (W.D. Mo. 1979)..... 16

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 17

Knight v. Mills, 836 F.2d 659 (1st Cir. 1987)..... 17

Maggard v. Wyrick, 800 F.2d 195 (8th Cir.), cert denied, 479 U.S. 1068 (1986)..... 12

Miller v. Florida, 482 U.S. 423 (1987).....7, 9

O'Connor v. Donaldson, 422 U.S. 563 (1975).....15, 17

Prater v. United States Parole Comm'n, 802 F.2d 948 (7th Cir. 1986).....7, 8

Resnick v. United States Parole Comm'n, 835 F.2d 1297 (10th Cir. 1987)..... 7

Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1986) 16

TABLE OF AUTHORITIES – Continued

Page

Ruip v. United States, 555 F.2d 1331 (6th Cir. 1977)..... 7

Rush v. Petrovsky, 756 F.2d 675 (8th Cir. 1985)..... 12

Sheary v. United States Parole Comm'n, 822 F.2d 556 (5th Cir. 1987)..... 7

Smart v. Simonson, 867 F.2d 429 (7th Cir. 1989)..... 17

United States ex rel. Forman v. McCall, 709 F.2d 852 (3d Cir. 1983), cert. denied, 476 U.S. 1119 (1986)..... 7

Vermouth v. Corrothers, 827 F.2d 599 (9th Cir. 1987)..... 7

Warden v. Marrero, 417 U.S. 653 (1974) 10, 11

Warren v. United States Parole Comm'n, 659 F.2d 183 (D.C. Cir. 1981), cert. denied, 455 U.S. 950 (1982)..... 7

Weaver v. Graham, 450 U.S. 24 (1981).....6, 10

Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)..... 16

Yamamoto v. United States Parole Comm'n, 794 F.2d 1295 (8th Cir. 1986).....7, 10

Youngberg v. Romeo, 457 U.S. 307 (1982).....14, 18

MINNESOTA DECISIONS:

Bailey v. Noot, 324 N.W.2d 164 (Minn. 1982)..... 1

State ex rel. Taylor v. Schoen, 273 N.W.2d 612 (Minn. 1978).....3, 4

TABLE OF AUTHORITIES – Continued

Page

FEDERAL CONSTITUTION:

U.S. Const. art. 1, § 9, cl. 3 ..... *passim*

U.S. Const. amend. 14 ..... *passim*

FEDERAL STATUTES:

42 U.S.C. § 1983 5

MINNESOTA STATUTES:

Minn. Stat. § 243.05 (1990) 8

Act of June 1, 1981, ch. 360, § 4, 1981 Minn. Laws 2337 3

Minn. Stat. § 15.0411, subd. 2 (1980) 4, 11

Minn. Stat. § 243.05 (1980) 8

Minn. Stat. § 526.09 (1976) 1

MINNESOTA RULES AND REGULATIONS:

Minn. Rules ch. 2940 (1991) 3

Minn. Rules pt. 2940.1500, subp. 2 (1991) 3, 9

Minn. Rules pt. 2940.1500, subp. 2A (1991) 3

Minn. Rules pt. 2940.1500, subp. 2B(3) (1991) 4

Minn. Corr. Bd. R. 7-104.4 (1977) 4

STATEMENT OF THE CASE

In 1977, petitioner committed several crimes in Minnesota and Iowa including the kidnapping, rape and murder of a 13 year old girl. Petitioner pled guilty in Minnesota to criminal sexual conduct in the first degree and kidnapping, and was sentenced to concurrent 20 and 40 year prison terms. Shortly thereafter, petitioner was also committed to the Minnesota Security Hospital ("MSH") as a psychopathic personality pursuant to Minn. Stat. § 526.09 (1976). *Bailey v. Noot*, 940 F.2d 1150, 1152 (8th Cir. 1991). *See also Bailey v. Noot*, 324 N.W.2d 164, 165 (Minn. 1982).

Petitioner resided at MSH from 1977 to 1981. Petitioner was evaluated by psychiatrists and psychologists periodically throughout his stay at MSH. These officials' reports on petitioner uniformly concluded the following: (1) petitioner was not genuinely interested in reform but rather was most interested in living in a setting which provided him with freedom and comfort; (2) petitioner was extremely dangerous – a maximum security risk to both the public and patients at MSH; and (3) there was little, if any, treatment advantage to keeping petitioner at MSH. Department of Human Services 8th Cir. Appendix at A-25 to 84 ("DHS App."). During petitioner's stay at MSH, the staff periodically developed treatment plans for him and the appropriate treatment teams reviewed those plans with some frequency. In conjunction with these plans, petitioner was offered numerous opportunities to participate in treatment programs, including sex education and awareness classes, chemical dependency group programs, general group counseling sessions, education programs, and vocational training programs. Petitioner

often refused to participate in these programs. *See Bailey v. Noot*, 940 F.2d at 1152. DHS App. at A-67 to 191.[1]

In 1978, respondent Sheppard, then Medical Director at MSH, petitioned the Minnesota Department of Public Welfare (the predecessor of the Minnesota Department of Human Services) for Bailey to be transferred to the Minnesota Department of Corrections ("DOC"). Sheppard submitted the petition because of his concerns about security and because he concluded that Bailey would benefit more from treatment at MSH at the end of his criminal sentence. After lengthy legal proceedings, Bailey was ultimately transferred to DOC in 1981. *Bailey v. Noot*, 940 F.2d at 1152. DHS App. at A-32, 33.[2]

In 1981, the Minnesota Corrections Board ("MCB"), then the paroling authority in Minnesota, conducted an

---

[1] Petitioner cites certain deposition testimony of respondent Sheppard in his effort to show that he did not receive treatment while at MSH. Pet. at 7. However, petitioner lifts the testimony out of context. Petitioner's counsel's questions were clearly directed at petitioner's request to participate in a particular treatment program, MSH's Intensive Treatment Program for Sexual Aggressiveness. *See, e.g.*, Bailey's 8th Cir. App. at A-146; DHS App. at A-13 to 14.

[2] Bailey erroneously states that MSH petitioned for the transfer after Bailey's appearance before the Hospital Review Board. Pet. at 7. Instead, Bailey complained to the Board shortly after Sheppard's submission of the transfer petition. DHS App. at A-32. In addition, Bailey's characterization of the Hospital Review Board's action as "hearing evidence from both sides," is somewhat misleading. Pet. at 7. The Board heard evidence from a complaining resident without the hospital staff present, and then separately asked the hospital staff to respond. DHS App. at A-32.

initial review of petitioner's case as a result of his transfer. DOC Dist. Ct. App., Alstad Dep. at 37-40; Alstad Dep. Ex. 5. Because of the extreme severity of petitioner's offense and the danger which he posed to the public, the MCB decided to remove petitioner's case from the parole release date matrix and to assign him to serve to the expiration of his sentence.[3] DOC 8th Cir. App. at A-68 to 74. Petitioner was informed that "the Minnesota Corrections Board will not consider any form of release prior to the expiration of sentence unless psychiatric, psychological and correctional staff can certify that you are no longer a danger to the public in general and/or young females specifically." DOC 8th Cir. App. at A-73 to 74. Subsequently, two members of the MCB met with Bailey to discuss his response to the MCB's decision. The reviewers agreed with the decision of the full MCB. DOC 8th Cir. App. at A-76; DOC Dist. Ct. App., Alstad Dep. at 59-60.

The Minnesota Legislature abolished the MCB in 1982 and transferred paroling authority to the Minnesota Commissioner of Corrections. Act of June 1, 1981, ch. 360, § 4, 1981 Minn. Laws 2337. Pursuant to statutory authority, the Commissioner promulgated rules concerning the parole of inmates. Minn. Rules ch. 2940 (1991). Those rules provide that decisions made regarding parole by the MCB "will be left in full force and effect by the Commissioner." Minn. Rues pt. 2940.1500, subp. 2A (1991).[4] This

---

[3] For an explanation of the purpose and operation of the matrix and the target release dates, see *State ex rel. Taylor v. Schoen*, 273 N.W.2d 612 (Minn. 1978).

[4] A complete copy of Minn. Rules pt. 2940.1500, subp. 2 appears in the appendix at A-1.

rule also provides that a special review may be held to modify a release date established by the MCB if the Commissioner makes a "policy change" regarding the term of imprisonment of such individuals. Minn. Rules pt. 2940.1500, subp. 2B(3) (1991). To date, the Commissioner has left the decision by the MCB concerning petitioner, that he serve to expiration, in full force and effect.

At the time of petitioner's transfer to DOC, the MCB guidelines were not rules promulgated pursuant to the Minnesota Administrative Procedures Act ("APA").[5] The guidelines merely set forth the procedures and policies for the exercise of the MCB's wide discretion. *See State ex rel. Taylor v. Schoen*, 273 N.W.2d 612, 618 (Minn. 1978). *See also* DOC Dist. Ct. App., Green Dep. at 5.

The MCB guidelines provided for an annual review of an inmate's release date. Minn. Corr. Bd. R. 7-104.4(b) (1977).[6] This review was not a hearing for reconsideration of an inmate's parole. It consisted only of an "on paper" review by the MCB of brief materials prepared by the inmate's caseworker. The MCB merely reviewed the summary prepared by the caseworker and continued the inmate's parole release date assignment. DOC Dist. Ct. App., Green Dep. at 10. In fact, the MCB rarely changed a parole release date after the date was initially set. *Id.* at 7.

[5] The Minnesota APA specifically exempted the MCB from its rulemaking requirements. Minn. Stat. § 15.0411, subd. 2 (1980).

[6] A complete copy of Minn. Corr. Bd. R. 7-104.4(b) appears in the appendix at A-2.

The MCB made it very clear that Bailey would serve to expiration of his sentence. *Id.* at 40.[7]

In 1982, Bailey initiated this litigation pursuant to 42 U.S.C. § 1983 claiming, among other things, that (1) the DOC, in changing the parole guidelines, had violated the ex post facto clause; and (2) that the Department of Human Services ("DHS") defendants had denied Bailey treatment for his psychopathic personality commitment and thus violated the fourteenth amendment. Following cross-motions for summary judgment, the district court entered judgment for respondents. The court adopted the magistrate's report and recommendation, holding that the Minnesota parole guidelines in question were not laws for purposes of the ex post facto clause and that the challenged changes to the guidelines did not add to the quantum of appellant's punishment and thus did not violate the ex post facto clause. Bailey's 8th Cir. Brief at A-6 to 10, 68 to 74. Regarding plaintiff's fourteenth amendment claim, the court also adopted the magistrate's report and recommendation, holding that DHS defendants were qualifiedly immune from damages because the alleged right to treatment was not clearly established and that petitioner was not entitled to declaratory or injunctive relief because DHS defendants' actions had

[7] Petitioner states that he received an annual review from the MCB. Pet. at 4. However, the record indicates that the MCB only reviewed petitioner's status twice: (1) the MCB conducted an initial review as a result of Bailey's transfer from MSH in May, 1981; and (2) in September, 1981, two MCB members met with Bailey to discuss his response to the board's determination. DOC 8th Cir. App. at A-73 to 76. As noted above, the MCB was abolished effective June 30, 1982.

satisfied his claimed right to treatment. Bailey's 8th Cir. App. at A-27 to 36, 65 to 67.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed and subsequently denied Bailey's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED AS TO PETITIONER'S EX POST FACTO CLAIM BECAUSE THE OVERWHELMING WEIGHT OF AUTHORITY SUPPORTS THE MAJORITY DECISION BELOW THAT THE CHALLENGED CHANGE IN MINNESOTA'S PAROLE RULES DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

Petitioner attempts to create important unresolved issues of constitutional law and splits in the circuits in support of his petition. However, in his effort, petitioner mischaracterizes the importance of the issue presented and the current state of the law. The decision below was well founded on the relevant case law from this Court and the courts of appeal, and the petition should therefore be denied.

A. The Minnesota Rules Are Not Laws For Purposes Of The Ex Post Facto Clause.

The threshold question in ex post facto analysis is whether the challenged change constitutes a "law" for ex post facto purposes. *Weaver v. Graham*, 450 U.S. 24, 29

(1981). On this question, the majority below correctly concluded that the challenged DOC rules are not laws.

The majority below reached this conclusion by relying on the numerous cases from other circuits holding that the federal parole guidelines are not laws. *Resnick v. United States Parole Comm'n*, 835 F.2d 1297, 1301 (10th Cir. 1987); *Vermouth v. Corrothers*, 827 F.2d 599, 604 (9th Cir. 1987); *Sheary v. United States Parole Comm'n*, 822 F.2d 556, 558 (5th Cir. 1987); *Prater v. United States Parole Comm'n*, 802 F.2d 948, 953 (7th Cir. 1986) (en banc); *DiNapoli v. Northeast Regional Parole Comm'n*, 764 F.2d 143, 146-47 (2d Cir.), *cert. denied*, 474 U.S. 1020 (1985); *Dufresne v. Baer*, 744 F.2d 1543, 1549-90 (11th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985); *Warren v. United States Parole Comm'n*, 659 F.2d 183, 193-97 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Ruip v. United States*, 555 F.2d 1331, 1335-36 (6th Cir. 1977). The Eighth Circuit has favorably recognized this "impressive line of authority," *Yamamoto v. United States Parole Comm'n*, 794 F.2d 1295, 1297 (8th Cir. 1986), but it has not yet squarely addressed the issue. Only the Third Circuit Court of Appeals has equivocated as to the status of the federal guidelines, finding that the federal regulations *may* be laws for purposes of ex post facto analysis. *United States ex rel. Forman v. McCall*, 709 F.2d 852, 862 (3d Cir. 1983), *cert. denied*, 476 U.S. 1119 (1986). While this Court has not squarely addressed the status of the federal parole guidelines, it discussed approvingly several of the above-referenced cases in *Miller v. Florida*, 482 U.S. 423, 434-35 (1987). Thus, the majority relied on a well-established body of law in concluding that the federal guidelines, at least, are not laws.

Obviously, the Minnesota parole rules, not the federal regulations, are at issue in the instant matter. However, both the Minnesota and federal regulations are agency statements which indicate how the paroling agency's discretion will be exercised. Thus, the reasoning of the federal courts in determining whether the federal guidelines are laws clearly applies.

In determining whether the federal guidelines are laws, the courts have generally asked two questions, (1) does the agency retain discretion in its decision-making; and (2) are the policies underlying the ex post facto clause implicated. *See, e.g., Prater v. United States Parole Comm'n*, 802 F.2d at 952-54; *DiNapoli v. Northeast Regional Parole Comm'n*, 764 F.2d at 146-47. Applying these questions to the instant matter demonstrates that the decision below correctly concluded that the Minnesota regulations are not laws for ex post facto purposes.

First, under the statute, the Commissioner of Corrections has the same discretion as his predecessor, the MCB. The current statutory language, which confers complete discretion on the Commissioner, is virtually identical to the MCB's statutory authority. *Compare* Minn. Stat. § 243.05 (1990) *with* Minn. Stat. § 243.05 (1980).[8] The Commissioner has exercised his discretion by adopting the MCB's determination as to petitioner.

Petitioner argues that because the parole guidelines promulgated pursuant to Minn. Stat. § 243.05 (1990) confer less discretion on DOC than the statute itself, the

---

[8] The relevant portion of Minn. Stat. § 243.05 (1980) appears in the appendix at A-1.

statute becomes irrelevant and the guidelines become the "laws" which should alone be reviewed. However, what is important is not the distinction between statutes and regulations, but is the decision-maker's ability to exercise discretion. In Minnesota, the decision-maker continues to have discretion relating to petitioner. The parole decision as to petitioner is not written in stone, as he would have the Court believe. The DOC rules specifically provide for special reviews and for modifications of a release date pursuant to policy changes of the Commissioner. *See* Minn. Rules pt. 2940.1500, subp. 2.

Second, the Minnesota rules do not contravene the policies underlying the ex post facto clause. Those policies are providing "fair notice . . . when the legislature increases punishment" and "restraining arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 430, 429 (1987). At the time petitioner committed his crimes, the law provided that a state agency had complete discretion regarding parole. That law has not changed. Pursuant to the law in existence at the time Bailey committed his crime, the MCB determined that petitioner should serve until expiration. The Commissioner merely adopted that decision. Furthermore, petitioner cannot possibly argue that the Minnesota regulations are "vindictive" or "arbitrary."

In sum, the decision below follows the reasoning of the great weight of authority which has analyzed the federal parole guidelines and concluded that they are not "laws" for purposes of the ex post facto clause. There exists uniformity among the courts that the key to analyzing whether such guidelines are laws is to examine the agency's discretion. The court below correctly concluded

that, in Minnesota, the decision-maker retains discretion and that the Minnesota parole guidelines therefore are not "laws." There is no reason for this Court to review that decision.

B. Even If The Minnesota Rules Are Laws, They Do Not Substantially Disadvantage Petitioner And Therefore Do Not Violate The Ex Post Facto Clause.

Two elements are required to establish that a law violates the ex post facto clause: (1) the law must apply to events occurring before its enactment; and (2) the law must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

The rules at issue in this case are admittedly retrospective as applied to petitioner. However, any disadvantage resulting to him does not rise to the level required for an ex post facto violation.[9]

Petitioner correctly states that this Court has indicated that adverse changes in a prisoner's eligibility for parole *may* violate the ex post facto clause. *Warden v. Marrero*, 417 U.S. 653, 663 (1974). The Eighth Circuit has followed this position, *Yamamoto*, 794 F.2d at 1300-01, and its decision below is not to the contrary. However, key to determining whether a particular change violates the ex post facto clause, is whether the change imposes "a

[9] Petitioner erroneously claims that the state "recognzies" that the application of the current parole guidelines disadvantages him. Pet. at 6. The DOC has never made such a statement.

greater or more severe punishment." *Marrero*, 417 U.S. at 663. In the instant matter, the district court correctly found that the challenged rules did not increase the quantum of petitioner's punishment.

Petitioner argues that the current rules work to his detriment because they somehow either repeal his parole or remove his eligibility for parole. However, he is wrong. The rules have neither effect. *See Bailey v. Noot*, 940 F.2d at 1157 n.7.[10] The MCB assigned petitioner to the expiration of his sentence. The Commissioner of Corrections affirmed that decision. Obviously, the quantum of petitioner's punishment has not changed.

Nor has the removal of the MCB's annual reviews substantially disadvantaged petitioner. The annual review was conducted pursuant to MCB policies and procedures which could have been changed at any time, without following the Minnesota Administrative Procedures Act. *See* Minn. Stat. § 15.0411, subd. 2 (1980) (exempting the MCB from the Minnesota APA). In addition, the annual review was not an occasion for the reconsideration of an inmate's previously assigned parole release date. The purpose of the annual review was simply to evaluate, on paper, the inmate's progress at the institution as it applied to the MCB's plans for that inmate's release.

[10] Although the decision below does not address this prong of ex post facto clause analysis, it does state that DOC's action did not postpone petitioner's parole eligibility. *Bailey*, 940 F.2d at 1157 n.7.

Moreover, petitioner has failed to show that he would have received a more favorable parole determination from the MCB than he has from the Commissioner, so there is no ex post facto violation. *See, e.g., Rush v. Petrovsky,* 756 F.2d 675, 676 (8th Cir. 1985) (no ex post facto claim where petitioner failed to show he would have received a more favorable parole determination). The reasons behind the MCB's decision to assign petitioner expiration of his sentence are still in existence. Nothing exists in the record to indicate that petitioner does not represent a serious threat to the public safety. As he would not have been released by the MCB, the fact that he has not been released by the Commissioner cannot be said to operate to his detriment. *See Maggard v. Wyrick,* 800 F.2d 195, 197-98 (8th Cir.), *cert. denied,* 479 U.S. 1068 (1986) (reasons are "equally compelling" under the older new release statutes, so have not operated to petitioner's disadvantage); *Burnside v. White,* 760 F.2d 217, 222-23 (8th Cir.), *cert. denied,* 474 U.S. 1022 (1985) (because the reasons for denying parole are still present, petitioner would not have been released under either the old or new statute, so the guidelines do not operate to his disadvantage).

Petitioner relies heavily on *Akins v. Snow,* 922 F.2d 1558 (11th Cir.), *cert. denied,* ___ U.S. ___, 111 S. Ct. 2915 (1991), in his effort to demonstrate a conflict in the circuits on the issue of whether a change in state parole rules violates the ex post facto clause. However, *Akins* is very different from the instant case. In *Akins,* the parole *statute,* as well as the rules in existence at the time of the plaintiff's sentence, required an annual hearing to reconsider the inmate's initial parole decision. The subsequent

changes to both the statute and rules required a reconsideration hearing only every eight years. Under the scheme, the hearing was essential for parole – no parole decision would be made without it.

The statute and rules in *Akins* permitted no agency discretion, in marked contrast to the situation presented here. In addition, as is indicated above, the instant case simply does not raise a question of reconsideration of parole or removal of parole eligibility. Thus, although the court in *Akins* found the plaintiff disadvantaged, Bailey is not. As a result, there is no conflict between the Eighth and Eleventh Circuits on this issue and no need for this Court's review.

In sum, the Court should deny the petition as to petitioner's ex post facto claim. The decision below that the Minnesota parole guidelines in question are not "laws" for purposes of the ex post facto clause is well-founded on the widely accepted standard of reviewing the decision-maker's discretion. The court below correctly found that, in Minnesota, the decision-maker retains discretion and therefore the guidelines are not "laws." In addition, contrary to petitioner's arguments, this case presents neither a significant constitutional question nor a conflict in the circuits regarding removal of eligibility for parole. The petition should therefore be denied.

II. THE COURT SHOULD DENY THE PETITION AS TO PETITIONER'S CLAIM OF A RIGHT TO TREATMENT UNDER THE FOURTEENTH AMENDMENT BECAUSE THERE IS NO SPLIT IN THE CIRCUITS AND BECAUSE OTHER GROUNDS SUPPORT THE DECISIONS OF THE COURTS BELOW.

It is true that this Court has never squarely addressed the issue of whether a dangerous civilly committed sexual psychopath also serving a prison sentence has a right to treatment under the fourteenth amendment. The Court should nonetheless deny the petition as to this issue for three reasons. First, the Eighth Circuit reasonably determined that the petitioner has no such right, and there is no split in the circuits on this issue. Second, even if such a right exists, two other grounds support the judgment below: (1) as the district court found, DHS defendants are qualifiedly immune from damages because such a right was not clearly established at the time petitioner resided at MSH; and (2) as the district court found, and the Eighth Circuit affirmed, petitioner presented insufficient evidence below to defeat summary judgment for DHS defendants.[11]

[11] Petitioner erroneously claims that the Eighth Circuit addressed only the issue of whether petitioner has a right to treatment under the Fourteenth Amendment. Pet. at 18. In fact, the court also specifically affirmed the district court's decision that DHS defendants satisfied the right to treatment standard articulated in *Youngberg v. Romeo*, 457 U.S. 307 (1982). *Bailey v. Noot*, 940 F.2d at 1154 n.4.

A. The Eighth Circuit Reasonably Determined That Petitioner Has No Fourteenth Amendment Right To Treatment, And There Is No Split In The Circuits On This Issue.

In *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975), this Court established that a civilly committed non-dangerous mentally ill person has a right to treatment under the fourteenth amendment. Petitioner's situation differs in two distinct and significant ways. First, his civil commitment was specifically based on the finding that petitioner is a dangerous sexual psychopath. Second, he is also serving a sentence based on criminal felony convictions. Based on these distinctions, this case presented a question different from that addressed in *O'Connor*, and it was reasonable for the Eighth Circuit to reach a different result. As former Chief Justice Burger noted in his concurring opinion in *O'Connor*, the commitment of a dangerous person necessarily involves the additional policy consideration of protecting the public, and this reasonably distinguishes the analysis of the rights of dangerous and non-dangerous commitees. *See O'Connor*, 422 U.S. at 582-83 (Burger, C.J., concurring). Moreover, the basis of the fourteenth amendment right to treatment is the deprivation of liberty which results from commitment. In the case of a convicted felon subject to a criminal sentence, this rationale simply does not apply – the prisoner is being deprived of his liberty because he has committed a crime, not because of his mental disability. The court below reasonably relied on both of these grounds in holding that the petitioner "does not have the constitutional right he claims." *Bailey v. Noot*, 940 F.2d at 1154.

Moreover, there exists no split in the circuits on this issue. All of the cases cited by petitioner as contradicting the decision below are readily distinguished. *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1986), recognized a statutory, not constitutional, right to treatment for the mentally ill. Two of the other cases cited by petitioner address the right to treatment of persons who have been civilly committed but have not been convicted nor sentenced for criminal conduct. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Eckerhart v. Hensely*, 475 F. Supp. 908 (W.D.Mo. 1979). Finally, *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977), addresses the right to psychiatric treatment of prisoners, not civil commitees. In short, none of these decisions concerned the issue of a right to treatment for someone who, like petitioner, is under a dual commitment – a civil commitment as a dangerous sexual psychopath and a criminal sentence for felony convictions. Even if the court were interested in this issue, it would seem prudent to allow more courts of appeal to grapple with it first.

Because the Eighth Circuit reasonably resolved the issue and there is no split in the circuits, the Court should deny the petition.

B. DHS Defendants Are Qualifiedly Immune From Damages.

Even if petitioner has a right to treatment under the fourteenth amendment, the Court should deny the petition because DHS defendants are qualifiedly immune from damages, and the district court judgment is therefore correct.

This Court has established that government officials performing discretionary functions are immune from liability for damages so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The issue turns on the "objective legal reasonableness" of the officials' actions; they are shielded from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 438 U.S. 635, 638 (1987).

During the time period in question, neither this Court, nor the Eighth Circuit nor the district court for the district of Minnesota had ever decided "whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the state." *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975). In addition, there was no analogous decision of this Court guiding DHS defendants during this period, nor did any circuit court decisions exist clearly establishing that a person in petitioner's situation was entitled to treatment. In fact, two circuit courts, looking at the period of time during which petitioner resided at MSH, have conferred qualified immunity on state officials in the DHS defendants' shoes precisely because there was no clearly established right to treatment for civilly committed dangerous persons at that time. *Smart v. Simonson*, 867 F.2d 429 (7th Cir. 1989); *Knight v. Mills*, 836 F.2d 659 (1st Cir. 1987).

Although the Eighth Circuit did not address this issue, the district court, adopting the magistrate's scholarly analysis, held that DHS defendants were qualifiedly immune from damages. There is no meritorious reason to

review that decision here, and the petition for certiorari should therefore be denied.

C. DHS Defendants Are Entitled To Judgment As A Matter Of Law.

All of the judges who have reviewed this case have found that as a matter of law, the actions of the DHS defendants satisfied any right to treatment which petitioner may have. There is no reason to reopen this analysis, and the petition should therefore be denied.

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), this Court addressed the right to treatment of civilly committed mentally retarded persons. The court recognized a limited right to treatment for such persons, and described that right as follows:

> The constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally accepted choices should have been made.

457 U.S. at 321 (quotations and citations omitted). In the instant matter, all five judges addressing this issue have found that DHS' actions satisfied the *Youngberg* standard by providing petitioner with psychiatric and psychological evaluations and numerous treatment opportunities. Although it is true that *Youngberg* addresses the right to treatment of a civilly committed person, surely the scope of petitioner's rights can be no greater than those enjoyed by the involuntarily committed mentally retarded plaintiff in *Youngberg*. The courts below correctly determined that *Youngberg* was the appropriate standard to apply, and

their conclusions are amply supported by the record. The petition for certiorari should therefore be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

CATHARINE F. HAUKEDAHL
Solicitor General
Counsel of Record

525 Park Street, Suite 200
St. Paul, MN 55103
(612) 296-7537

Attorneys for Respondents

APPENDIX

Page

Minn. Stat. § 243.05 (1980) A-1

Minn. Rules § 2940.1500, subp. 2 (1991) A-1

Minn. Corr. Bd. R. 704.4(b) (1977) A-2

Minn. Stat. § 243.05 (1980)

The corrections board may parole any person sentenced to confinement . . . .

Minn. Rules pt. 2940.1500, subp. 2 (1991)

Subp. 2. Review of release dates. Incarcerated inmates with indeterminate sentences governing their release dates which were established prior to July 1, 1982, shall be handled as follows in items A to C.

A. All release dates established by the Minnesota corrections board will be left in full force and effect by the commissioner.

B. Special reviews of the purpose of modifying release dates established by the Minnesota corrections board shall be considered by the executive officer of adult release for the following reasons:

(1) correcting mathematical, data entry, or computational errors;

(2) sentence change caused by modification in the computation of the "Minnesota Corrections Board Parole Decision-Making Guidelines"; and

(3) policy changes established by the commissioner which affect the term of imprisonment.

C. The program review team shall determine if the criteria for a special review have been met. If the criteria have been met, the program review team shall forward

the information and recommendation to the executive officer of adult release. The executive officer of adult release shall make the final decision, regarding the requested adjustment in the release date.

Minn. Corr. Bd. R. 704.4(b) (1977)

Interim annual reviews

Annual reviews between the initial hearing and the re-entry hearing will be non-appearance reviews. For these annual reviews the caseworker will prepare a summary which contains information relative to:

(1) Inmate progress on MAP contract, if applicable.

(2) Inmate participation in activities, programs, treatment, education, vocational training, work assignments, etc.

(3) Any convictions (including guilty pleas or "waivers") of violations of the Inmate Disciplinary Code, and the disposition for each conviction.

(4) Any reports given the inmate for meritorious behavior.

Caseworkers will provide the copies of this summary to the Board and to the inmate ten working days before the scheduled interim review.